



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
CIVIL RIGHTS

RETURN RECEIPT REQUESTED

Father Phil Schmitter, Co-Director
Sister Joanne Chiaverini, Co-Director
St. Francis Prayer Center
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Flint, Michigan 48505

Russell Harding, Director
Michigan Department of Environmental Quality
Hollister Building
P.O. Box 30473
Lansing, Michigan 48909-7973

Re: EPA File No. 5R-98-R5 (Select Steel Complaint)

Dear Fr. Schmitter, Sr. Chiaverini, and Mr. Harding,

On August 17, 1998, the Office of Civil Rights (OCR) accepted for investigation an administrative complaint filed on June 9, 1998 by Father Phil Schmitter and Sister Joanne Chiaverini pursuant to Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d et seq. (Title VI), and EPA's implementing regulations, 40 C.F.R. Part 7. The complaint alleges that the Michigan Department of Environmental Quality's (MDEQ) issuance of a Clean Air Act (CAA) Prevention of Significant Deterioration (PSD) permit to the Select Steel Corporation of America for a proposed steel recycling mini-mill in Genesee Township would lead to a discriminatory impact on minority residents and that the MDEQ permitting process was conducted in a discriminatory manner. In addition to the allegations contained in the complaint filed with OCR, the Complainants also submitted written information regarding alleged discrimination related to the permitting of the proposed Select Steel facility in an April 22, 1998 letter from Fr. Schmitter and Sr. Chiaverini to the Sugar Law Center, an April 29, 1998 letter to David Ullrich, Acting Regional Administrator for Region V, and a June 9, 1998 petition to EPA's Environmental Appeals Board (EAB).

Title VI prohibits discrimination based on race, color, or national origin under programs or activities of recipients of federal financial assistance. EPA has adopted Title VI implementing regulations that prohibit unjustified discriminatory *effects* which occur under federally-assisted programs or activities. 40 C.F.R. Part 7. Discrimination can result from policies and practices that are neutral on their face, but have the *effect* of discriminating. Facially neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless they are justified and there are no less discriminatory alternatives.

MDEQ is a recipient of EPA financial assistance; therefore, MDEQ is subject to the requirements of Title VI and EPA's implementing regulations. Section 7.35(b) prohibits recipients from administering their programs in a manner that would have the effect of subjecting individuals to discrimination because of their race, color, or national origin. Section 7.30 of EPA's Title VI regulations provides that no person may be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, or national origin.

The June 9, 1998 Title VI complaint filed with OCR refers generally to the "unfair and disparate burden of pollution [which] will fall on a group of minority . . . people." However, in other information provided to EPA in writing and during interviews, the Complainants also raised specific concerns about the facility's potential emissions of volatile organic compounds (VOCs), lead, air toxics, and dioxin.

As previously mentioned, OCR accepted the complaint for investigation in August 1998, and has completed its review of the allegations raised. In analyzing the Complainants' concerns regarding air quality and public health effects, EPA has determined that this facility would not pose an "adverse" effect on the community. In this case, EPA did not base its finding on whether the effects would be disparate since the effects did not rise to the level of "adverse." After reviewing all the facts in this case, OCR has found that neither the Complainants' concerns regarding air quality nor those regarding the opportunity for public participation rise to the level of a discriminatory effect within the meaning of Title VI and EPA's implementing regulations. Therefore, OCR dismisses Complainants' allegations in this case. The basis for this determination is explained below.

The Investigation

EPA investigated this matter consistent with its *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (Interim Guidance). EPA has attempted to conduct this investigation expeditiously, taking into account the need for certainty in the regulatory process associated with permitting new facilities, while at the same time seriously reviewing the concerns expressed by the Complainants.

EPA's ability to expeditiously render this decision was facilitated significantly by the record of decision developed by the State in this case. In addition, analyses of the kind credibly undertaken by the State to address concerns raised during the permitting process not only substantially enhance the probability that State-issued permits will withstand scrutiny under Title VI, but also enables expeditious processing by EPA of administrative complaints filed under Title VI. Such analyses early in the permitting process may also facilitate the State's early identification and development of possible solutions to address potential Title VI concerns.

Alleged Discriminatory Effect Resulting from Air Quality Impacts

As outlined in EPA's *Interim Guidance*, EPA follows five basic steps in its analysis of allegations of discriminatory effects from a permit decision. "The first step is to identify the population affected by the permit that triggered the complaint. The affected population is that which suffers the adverse impacts of the permitted activity." *Interim Guidance* at 8. If there is no adverse effect from the permitted activity, there can be no finding of a discriminatory effect which would violate Title VI and EPA's implementing regulations. In order to address the allegation that MDEQ's issuance of a PSD permit for the proposed Select Steel facility would result in a discriminatory effect, EPA first considered the potential adverse effect from the permitted facility using a number of analytical tools consistent with EPA's *Interim Guidance*. It is important to note that EPA believes that the evaluations of adverse, disparate impact allegations should be based upon the facts and totality of the circumstances each case presents.

VOCs

To evaluate the impact of VOCs, EPA examined the permit application submitted by Select Steel and a variety of analyses conducted by MDEQ. With that information, EPA considered VOCs in their role both as precursors to ozone and, for some VOCs, as toxic air pollutants (see discussion below concerning air toxics). In examining VOCs as ozone precursors, EPA studied the additional contribution of VOCs from the proposed Select Steel facility and has determined those emissions will not affect the area's compliance with the national ambient air quality standards (NAAQS) for ozone.

The NAAQS for ozone is a health-based standard which has been set at a level that is presumptively sufficient to protect public health and allows for an adequate margin of safety for the population within the area; therefore, there is no affected population which suffers "adverse" impacts within the meaning of Title VI resulting from the incremental VOC emissions from the proposed Select Steel facility. Therefore, EPA finds no violation of Title VI or EPA's implementing regulations associated with VOCs as ozone precursors.

The Complainants also have alleged that failure to require immediate VOC monitoring for the proposed Select Steel facility will result in a discriminatory effect. Select Steel's permit condition regarding VOC monitoring allows Select Steel one year from plant start-up to

implement a continuous emissions monitoring system ("CEMS") for VOCs. MDEQ is not required to prescribe immediate VOC monitoring because EPA's regulations allow the permitting authority to impose post-construction monitoring as it "determines is necessary." 40 C.F.R. § 52.21(m)(2). As discussed above, there would be no affected population that suffers "adverse" impacts within the meaning of Title VI resulting from the incremental VOC emissions from the proposed Select Steel facility. For this reason, EPA finds that, with regard to VOC monitoring, MDEQ did not violate Title VI or EPA's implementing regulations.

Lead

Similarly, to evaluate potential lead emissions from the facility, EPA studied the additional contribution of airborne lead emissions from the proposed Select Steel facility and has determined those emissions will not affect the area's compliance with the NAAQS for lead. As with ozone, there is a NAAQS for lead that has been set at a level presumptively sufficient to protect public health and allows for an adequate margin of safety for the population within the attainment area. Therefore, there would be no affected population which suffers "adverse" impacts within the meaning of Title VI resulting from the incremental lead emissions from the proposed Select Steel facility. Accordingly, EPA finds no violation of Title VI or EPA's implementing regulations.

In this case, MDEQ also appropriately considered information concerning the effect of the proposed facility's lead emissions on blood lead levels in children in response to community concerns. EPA reviewed this information along with other available data on the incidence and likelihood of elevated blood lead levels in Genesee County, particularly in the vicinity of the site of the proposed facility. EPA considered this additional information in response to the Complainants' concerns that the existing incidence of elevated blood lead levels in children in the vicinity of the proposed facility were already high. Overall, EPA found no clear evidence of a prevalence of pre-existing lead levels of concern in the area most likely to be affected by emissions from the proposed facility. Furthermore, EPA concurs with the State's finding that lead emissions from the proposed Select Steel facility would have at most a *de minimis* incremental effect on local mean blood lead levels and the incidence of elevated levels.

Air Toxics

For airborne toxics, EPA conducted its review based on information presented in the permit application, existing TRI data, and MDEQ documents. EPA reviewed MDEQ's analysis of Select Steel's potential air toxic emissions for evidence of adverse impacts based on whether resulting airborne concentrations exceeded thresholds of concern under State air toxics regulations. EPA also considered the potential Select Steel air toxic emissions together with air toxic emissions from Toxics Release Inventory (TRI) facilities, the Genesee Power Station, and other major sources in the surrounding area. EPA's review of air toxic emissions from both the proposed site alone, as well as in combination with other sources, found no "adverse" impact in

the immediate vicinity of the proposed facility. Therefore, EPA finds no violation of Title VI or EPA's implementing regulations.

Dioxin

The information gathered from the investigation concerning the monitoring of dioxin emissions is consistent with EAB's analysis of the issue.¹ No performance specifications for continuous emissions monitoring systems have been promulgated by EPA to monitor dioxins. Without a proven monitor, MDEQ was unable to impose a monitoring requirement on the source. Therefore, EPA finds no discriminatory effect associated with MDEQ's decision not to include monitoring requirements for dioxin and that MDEQ did not violate Title VI or EPA's implementing regulations.

Alleged Discriminatory Public Participation Process

To assess the allegations of discrimination concerning public process, EPA evaluated the information from interviews with Complainants and MDEQ, and from documents gathered from the parties. The first allegation was that the permit was "hastily sped through" by MDEQ to avoid permitting requirements (*i.e.*, conduct a risk assessment; provide opportunity for public comment on risk assessment; provide meaningful opportunity for all affected parties to participate in the permit process) imposed by a State trial court that are under appeal. The five months between receipt of the complete permit application and permit approval is actually slower than the average time of one and a half months for the past twenty-six PSD permits approved by MDEQ. EPA's review found that the public participation process for the permit was not compromised by the pace of the permitting process. MDEQ satisfied EPA's regulatory requirements concerning the issuance of PSD permits.

The Complainants also alleged that the relationship between an employee of Select Steel's consultant who is a former MDEQ employee and MDEQ led to improprieties in the permitting process. Neither the documents nor the interviews revealed any improper or unlawful actions by MDEQ and Select Steel's consultants during the permitting of Select Steel. Without any such evidence, EPA cannot find any impropriety existed that contributed to an alleged discriminatory process.

¹ In the EAB's analysis of Complainants' PSD appeal concerning monitoring of dioxin, the Board similarly concluded that "MDEQ's decision is not clearly erroneous." *In re Select Steel Corporation of America*, Docket No. PSD 98-21, at 5 (EAB Sept. 10, 1998). That holding was based, in part, on the fact that the Complainants made "no argument and points out no data to refute MDEQ's judgment." *Id.*

The Complainants alleged that the manner of publication of the notice of the permit hearing also contributed to the alleged discriminatory process. The Complainants allege that publication in newspapers was insufficient to inform the predominantly minority community because few community members have access to newspapers -- something the Complainants allege was brought to MDEQ's attention during the permitting process for another facility in Genesee Township. EPA's regulations for PSD permitting require that notice of a public hearing must be published in a weekly or daily newspaper within the affected area. 40 C.F.R. § 124.10(c)(2)(i). In this case, MDEQ went beyond the requirements of the regulation and published notices about the hearing in three local newspapers.

Complainants also state that MDEQ's failure to provide individual notice of the hearing to more members of the community also contributed to the alleged discriminatory process. In addition to newspaper notice, EPA's regulations require that notice be mailed to certain interested community members. 40 C.F.R. § 124.10(c)(1)(ix). MDEQ mailed hearing notification letters a month in advance to Fr. Schmitter, Sr. Chiaverini, and nine other individuals in the community who had expressed interest in the Select Steel permit -- an action which is consistent with the requirements of EPA's regulations. The mailing list that MDEQ developed was adequate to inform the community about the public hearing, in part, because the Complainants took it upon themselves to contact other members of the community.

The Complainants also alleged that the location of the public hearing (Mount Morris High School) made it difficult for minority members of the community to attend. Complainants felt that the hearing should have been held at Carpenter Road Elementary School. Both schools are approximately two miles from the proposed Select Steel site; however, the elementary school is located in a predominantly minority area, while the high school is in a predominantly white area.² MDEQ explored other possible locations and chose the high school, among other reasons, because of its ability to accommodate the expected number of citizens and its close proximity to the proposed site. The high school also is accessible by the general public via Genesee County public transportation.

For all of these reasons, EPA finds that the public participation process for the Select Steel facility was not discriminatory or in violation of Title VI or EPA's implementing regulations.

Conclusion

After reviewing all of the materials submitted and information gathered during the investigation, EPA has not found a violation of Title VI and EPA's implementing regulations.

² No concerns were raised about the manner in which the public hearing itself was conducted. *See* Telephone Interview with Complainants (September 17, 1998).

Accordingly, EPA is dismissing the complaint as of the date of this letter. Please note that the closure of this case does not affect your right to file a complaint with OCR in the future.

Although EPA has dismissed this complaint, we believe that the Complainants raised serious and important issues that merited a careful review. To the extent the Complainants have identified general concerns about pollution in their community, including existing elevated blood lead levels in children, EPA encourages the State to continue activities to address these concerns. EPA is available to provide technical assistance in these efforts. EPA also encourages the State to continue working with this community to improve understanding of regulated activities in their local environment and the Agency is available to facilitate these efforts should the parties so desire.

More broadly, EPA believes that many of the issues raised in the context of Title VI administrative complaints could be better addressed through early involvement of affected communities in the permitting process. Such consultations will better ensure that communities are fairly and equitably treated with respect to the quality of their environment and public health, while providing State and local decision makers and businesses the certainty they deserve.

In conclusion, please be aware that Title VI provides all persons the right to file complaints against recipients of federal financial assistance. No one may intimidate, threaten, coerce, or engage in other discriminatory conduct against anyone because he or she has either taken action or participated in an action to secure rights protected under Title VI. 40 C.F.R. § 7.100. Any individual alleging such harassment or intimidation may file a complaint. 40 C.F.R. § 7.120(a). The Agency would seriously consider and investigate such a complaint if warranted by the situation.

Furthermore, under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that we receive such a request, we will seek to protect, to the extent provided by law, personal information which, if released, could constitute an unwarranted invasion of privacy.

Sincerely,

Ann E. Goode
Director

cc: Mr. Robert Bosar, Vice President
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